

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
MICHAEL L. JEMISON	)	CASE NO. 03-31526 HCD
WANDA JEAN JEMISON,	)	CHAPTER 13
	)	
DEBTORS.	)	

Appearances:

Loraine P. Troyer, Esq., attorney for debtors, 121 North Third Street, Goshen, Indiana 46526;

Howard Howe, Esq., attorney for creditor, 50 South Meridian Street # 605, Indianapolis, Indiana 46204; and

Debra L. Miller, Esq., Chapter 13 Trustee, 100 East Wayne Street, P.O. Box 11550, South Bend, Indiana 46634-0550.

MEMORANDUM OF DECISION

At South Bend, Indiana, on January 5, 2004.

Before the court are the debtors' amended Schedule F, filed by Michael L. and Wanda Jean Jemison ("debtors") on May 13, 2003, and the objection thereto. The amended schedule adds the creditor American Leisure Clubs, Ltd. ("American Leisure"), and parties in interest Elkhart Circuit Court and Howard Howe. The Objection to Amendment of Schedule F was filed by American Leisure Resort on May 22, 2003. For the reasons that follow, the court overrules the Objection.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(O) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rule of Bankruptcy Procedure 7052. Any

conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

### Background

The debtors filed their chapter 13 bankruptcy petition on March 21, 2003. On the same date, they filed their schedules, statements, and chapter 13 plan. On May 13, 2003, they amended Schedule F in order to add American Leisure Clubs, a creditor that was inadvertently omitted from the debtors' original filing. Upon receiving notice of the amendment, American Leisure Resort objected to the amended list of unsecured creditors.<sup>1</sup>

In its Objection to Amendment of Schedule F, the creditor stated that it held an unpaid judgment on a note and security agreement in the sum of \$894.58 plus interest and costs.<sup>2</sup> It asserted that, because it had not been notified of the Jemisons' March 21, 2003 bankruptcy filing until it received the Notice of Amendment on May 16, 2003, it had pursued and obtained a judgment against the Jemisons in state court on April 10, 2003. The creditor argued that the debtors' failure to file a correct schedule, as required by 11 U.S.C. § 521(1), prejudiced it. It asked that its name be struck from the schedule of creditors and that it receive damages ("a sum equal to the monetary value of the prejudice to Resort caused by the Jemisons' failure to correctly file their list of creditors including Resort") and attorney fees.

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<sup>1</sup> The debtors' Amended Schedule F actually added three names. The first is American Leisure Clubs, Ltd., a creditor holding a promissory note in the amount of \$740.00. The second is the Elkhart Circuit Court, which is listed as "representing American Leisure Clubs, Ltd." The third is Howard Howe, who also is listed as "representing American Leisure Clubs, Ltd." R. 19, Schedule F. The Objection to the Amended Schedule F was filed by American Leisure Resort. No explanation of the relationship between American Leisure Resort and American Leisure Clubs, Ltd., has been given to the court.

<sup>2</sup> The Jemisons entered into the note and security agreement with American Leisure Clubs Ltd. on December 11, 1998, by making a down payment of \$150.00 toward an initiation fee of \$1,495. *See* R. 32, Ex. A. On August 2, 2002, American Leisure Resort's collection attorney, Howard Howe, demanded from them a payment of \$712.58, the entire balance owed at that time. *See id.*, Ex. B. When no payment was forthcoming, the creditor instituted a collection action in the Elkhart Circuit Court on March 3, 2003. The Jemisons were served with a summons and complaint on March 13, 2003. They filed no answer and made no payment. However, they filed a bankruptcy petition on March 21, 2003, without listing this creditor. On April 10, 2003, the Elkhart Circuit Court entered a default judgment against the Jemisons and in favor of American Leisure Resort in the amount of \$894.58. *See id.*, Ex. C.

In their response to the objection and at the hearing held July 31, 2003, the debtors argued that they had an absolute right to amend their schedules, under Bankruptcy Rule 1009, and that the amendment caused no prejudice to the creditor because it was filed prior to the bar date for filing claims. The creditor's position at the hearing was that it was prejudiced to the extent of the filing fees and attorney fees unnecessarily incurred because the debtors did not give notice to the creditor of the bankruptcy at the time it was filed. It insisted that the debtors had notice of the debt to this creditor, both from the demand letter of August 2, 2002, and the collection action in state court filed March 13, 2003. It argued that it would have ceased its action against the debtors if it had known of the bankruptcy.

### Discussion

The Bankruptcy Code requires a debtor to file "a list of creditors, and . . . a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs." 11 U.S.C. § 521(1). The debtors complied with that mandate by filing their bankruptcy petition and schedules on March 21, 2003. However, they inadvertently failed to list the creditor American Leisure. They filed an amended schedule on May 13, 2003, adding it as a creditor. The creditor asks the court not to allow the amendment on the ground that it was prejudiced by it.

Federal Rule of Bankruptcy Procedure 1009(a) states: "A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed." The Seventh Circuit Court of Appeals approves the liberal allowance of amendments by a debtor.

Agreeing with the position of other circuits regarding Bankruptcy Rule 1009(a), this circuit endorses the "permissive approach" of allowing amendment of schedules, including lists of exempt property, at any time before the case is closed, with the caveat that an amendment may be denied upon a clear and convincing showing of bad faith by the debtor or prejudice to the creditors.

*In re Yonikus*, 996 F.2d 866, 872 (7th Cir. 1993) (citing cases). Some circuits interpret the rule actually to prohibit courts "from denying the debtor's request to amend in a voluntary bankruptcy case, unless a creditor demonstrates the debtor's bad faith or prejudice to creditors." *Lowe v. Sandoval* (*In re Sandoval*), 103 F.3d 20,

22 (5th Cir. 1997); *see also* 9 *Collier on Bankruptcy* ¶ 1009.02[1] at 1009-3 (Allen N. Resnick & Henry J. Sommer, Eds-in-Chief, 15th ed. rev'd 2003) (“The permissive approach to amendments has been construed to give courts no discretion to reject amendments unless the debtor has acted in bad faith or concealed property, or the amendment would prejudice creditors.”). The court finds that, under this liberal amendment policy, the debtors were entitled to amend their petitions — unless the creditor demonstrates concealed property, bad faith or prejudice.

In this proceeding, the creditor did not allege concealed property or bad faith on the part of the debtors, and the court sees no evidence in the record of either. The creditor claimed that it was prejudiced by the amendment. The treatise *Collier on Bankruptcy* guides courts on the test for finding prejudice to creditors:

In determining whether the amendment would prejudice creditors, the appropriate inquiry is not whether a creditor will recover less or be adversely affected by the amendment. Instead, a court must determine whether the creditor would be adversely affected by having detrimentally relied on the debtor’s initial position. Only when a creditor has changed its position in reliance on the original statement, and would be adversely affected by amendment to that statement, may it be said that the creditor will be prejudiced by permitting the amendment.

*Id.* at 1009-4 (citing *In re Williamson*, 804 F.2d 1355, 1358 (5th Cir.1986) (stating that prejudice involves “harm to the creditor’s litigating position because of some detrimental reliance on the debtor’s initial position.”). Prejudice is not shown simply by the delay in filing an amendment. *See Martinson v. Michael (In re Michael)*, 163 F.3d 526, 529 (9th Cir. 1998) (citing *In re Doan*, 672 F.2d 831, 833 (11th Cir. 1982)). However, a creditor can be unduly prejudiced by the debtor’s inordinate delay. *See Szymanski v. Herzog (In re Szymanski)*, 189 B.R. 5, 7 (N.D. Ill. 1995) (affirming bankruptcy court’s finding that a 21-month delay in filing the amendment was an inordinate delay). Some courts use a balancing test for prejudice: “[I]f the prejudice to the Debtor outweighs that to the Creditor Defendant then an amendment should be allowed.” *Brown v. Sachs (In re Brown)*, 56 B.R. 954, 958 (Bankr. E.D. Mich. 1986).

The creditor in this case contended that its counsel expended time and court costs that would not have been expended had the Jemisons included the creditor on their original petition. However, the creditor itself demonstrated that its litigation activity – a demand letter and filing of a lawsuit in state court – occurred prior

to the bankruptcy filing. It did not show any use of time or funds since the debtors' filing of their petition. The court finds, therefore, that the debtors' failure to list the creditor in their initial schedules had no effect on the creditor's prepetition litigation time and monetary expenditures. It notes, as well, that because the amended schedules were filed well before the claims bar date of July 30, 2003, the creditor could have filed its claim. The creditor did not claim detrimental reliance on the debtors' initial position. Nor, the court further finds, did the creditor present evidence that the prejudice to it, if the amendment were allowed, would be greater than the prejudice to the debtors if the amendment were not allowed. *See Osborn v. Durant Bank & Trust Co. (In re Osborne)*, 24 F.3d 1199, 1206 (10th Cir. 1994) (concluding that, because facts concerning relative prejudice to the creditor and debtor were not developed, the showing of prejudice was insufficient).

The creditor's underlying concern, perhaps, is that the amendment, if allowed, would lead to the debtors' attempt to avoid the creditor's claim. However, that position misconstrues the prejudice to be proven by focusing on "the ultimate outcome of the action rather than the harm to the creditor's litigating posture because of some detrimental reliance on the debtor's initial position." *Stinson v. Williamson (In re Williamson)*, 804 F.2d 1355, 1358 (5th Cir. 1986). The Fifth Circuit succinctly explained:

Prejudice to the creditor's legal or equitable position does not occur merely because an amendment, if properly allowed, permits the debtor to assert a claim that ultimately prevails on the merits. Rule 1009 merely allows an amended claim to be made. The preliminary issue we address here is whether the bankruptcy court's allowing the amendment was an abuse of that court's discretion. We hold that it was not.

*Id.* (citation omitted).

The court thus determines that the creditor's showing of prejudice was not sufficient to justify the court's denial of the debtors' amendment under Rule 1009, under either the clear and convincing test presented by the Seventh Circuit in *Yonikus*, or by a preponderance of the evidence showing considered by other courts. *See, e.g., Arnold v. Gill (In re Arnold)*, 252 B.R. 778, 784-85 (9th Cir. B.A.P. 2000) (reviewing burdens of proof). It therefore overrules the creditor's objection to the amended Schedule F.

One other point is required. As the parties are aware, the debtors' filing of their bankruptcy petition automatically stays the continuation of a judicial action or proceeding against the debtors. *See* 11 U.S.C. § 362(a)(1). The court finds that the state court's entry of the default judgment, without knowledge of the recently filed bankruptcy case, was a violation of the automatic stay but not a willful one. However, once the creditor received notice that the bankruptcy had been filed, it had an affirmative duty to correct the stay violation, whether it was willful or inadvertent. *See Indiana Department of Revenue v. Williams*, 301 B.R. 871, 878 (S.D. Ind. 2003); *Keen v. Premium Asset Recovery Corp. (In re Keen)*, 301 B.R. 749, 756 (Bankr. S.D. Fla. 2003). The court therefore requires that the creditor take action to vacate the default judgment in order to undo the violation of the automatic stay. *See id.* The court directs the creditor to remedy the situation within thirty (30) days of the date of this order. Failure to comply in a timely fashion may cause the violation to be deemed willful and the creditor and his attorney to be subject to sanctions. *See Williams*, 301 B.R. at 878. Moreover, in recognition that the stay was violated and that the debtors have been required to respond to the creditor's objection to their amendment of Schedule F, the court grants the debtors' Motion for Attorney Fees. *See United States v. Price (In re Price)*, 42 F.3d 1068 (7th Cir. 1994) (affirming award of attorney fees and costs for creditor's violation of automatic stay).

### Conclusion

For the reasons stated above, the court finds that the creditor American Leisure Resort failed to demonstrate sufficient prejudice to justify the court's denial of the debtors' amendment of Schedule F under Federal Rule of Bankruptcy Procedure 1009(a). It therefore overrules the Objection to Amendment of Schedule F filed by the creditor.

The court also finds that the default judgment *American Leisure Resort v. Michael Jemison and Wanda Jemison*, Cause No. 20C01-0303-CC0145, filed in the Elkhart Circuit Court on April 10, 2003, was entered after the debtors filed their chapter 13 petition on March 21, 2003. It therefore constituted a violation

of the automatic stay. The court requires that the creditor take action to vacate that state court default judgment. The court directs the creditor to take such action within thirty (30) days of the date of this order.

Moreover, in recognition that the stay was violated and that the debtors have been required to respond to the creditor's objection to their amendment of Schedule F, the court grants the debtors' Motion for Attorney Fees. It directs debtors' counsel to file, with thirty (30) days, an application for reasonable attorney fees related to the time spent responding to the creditor's objection in this matter.

SO ORDERED.



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HARRY C. DEES, JR., CHIEF JUDGE  
UNITED STATES BANKRUPTCY COURT